

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DONALD RAY DEAN
Claimant

VS.

PURINA MILLS, INC.
Respondent
Self Insured

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Docket No. 242,427

ORDER

Respondent requested review of the May 26, 1999 preliminary hearing Order for Compensation entered by Administrative Law Judge Pamela J. Fuller.

ISSUES

The sole issue raised by respondent in its brief to the Appeals Board is whether claimant gave timely notice of his alleged accidental injury. Judge Fuller apparently found claimant gave timely notice of his January 4, 1999 injury because she ordered temporary total disability benefits to be paid for the period of January 15, 1999 through April 15, 1999. Respondent admits claimant sustained a work-related injury on January 4, 1999. Respondent further admits that claimant gave respondent notice of his work-related injury on January 28, 1999. But respondent contends notice was not given within 10 days of the accident date and there was no just cause for claimant's failure to give notice so as to extend the time to 75 days.¹ Respondent argues that, therefore, notice was not timely and claimant's claim for workers compensation benefits should be barred. Claimant contends he gave notice on January 5, 1999.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record² and considering the briefs of the parties, the Appeals Board finds that the ALJ's order should be affirmed.

¹ K.S.A. 44-520.

² Respondent's Appeal Brief states that the evidentiary record consists of the transcript of the Preliminary Hearing conducted on May 25, 1999, with exhibits, and the deposition of Ronald Ray Dean taken on March 19, 1999. Claimant's brief to the Board states the "Record of Evidence" consists of only the Preliminary Hearing transcript. It does not appear that the ALJ considered the March 19, 1999 deposition of claimant because it is not contained in the administrative file. Furthermore, there is no mention of that deposition in the Preliminary Hearing transcript. Given the absence of an agreement to include the deposition in the record, it has not been considered by the Board in this review.

Claimant injured his low back while working for respondent on January 4, 1999. The next day claimant told his supervisor, Ron Vasquez, that he hurt his back lifting a bag. Claimant's job duties included lifting bags that weighed from 40 to 50 pounds. Respondent argues that claimant did not indicate whether his injury occurred at work, but claimant's testimony was specific that he did. Ron Vasquez said he did not hear claimant say his injury occurred at work. He only recalls claimant saying his back hurt. But Mr. Vasquez admits his back was turned to claimant and he may not have heard all of what claimant said. He does not dispute claimant's contention that his injury occurred at work or say that claimant is not being truthful.

The ALJ observed the claimant testify and after doing so accepted his testimony. The Board often defers to the assessment of credibility made by an administrative law judge who has observed the witness testify. The Board also notes that in this case the claimant's testimony is persuasive. For these reasons, the Appeals Board finds and concludes that claimant gave notice of accident within 10 days and the Order for Compensation by the ALJ should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order for Compensation entered by Administrative Law Judge Pamela J. Fuller dated May 26, 1999, should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August 1999.

BOARD MEMBER

c: Scott J. Mann, Hutchinson, KS
Douglas C. Hobbs, Wichita, KS
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Director